



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO.E084 OF 2019**

**OXYGN8 EAST AFRICA LTD..... PLAINTIFF**

**VERSUS**

**BRIAN WALUCHIO.....DEFENDANT**

**RULING**

1. Before this Court the Notice of Motion Application dated **8<sup>th</sup> April 2019** by which **OXYGEN8 EAST AFRICA LTD** (the Plaintiff/Applicant) seeks Orders that:-

**“1. SPENT**

**2. SPENT**

**3. SPENT**

**4. The Respondent is barred from use of transfer of the Applicant’s resources and assets pending the hearing and determination of the Plaintiff.**

**5. The Respondent is barred from representing himself as a Director of the Applicant pending the hearing and determination of the Plaintiff.**

**6. The costs of this application and the entire suit be borne by the Respondent.**

2. The application which was premised upon **Section 1A, 1B, 3A** of the **Civil Procedure Act, Cap 21, laws of Kenya, Order 40 Rules 2** and **4** of the **Civil Procedure Rules 2010**, was supported by the Affidavit of even date sworn by **SHANE LEAHY**, the Director of the Plaintiff/Applicant and the Supplementary Affidavit dated **26<sup>th</sup> June 2019**.

3. The Respondent **BRIAN WALUCHIO**, opposed the application and in doing so relied upon the Replying Affidavit sworn by himself on **11<sup>th</sup> June 2019**. The Respondent also filed a Notice of Preliminary Objection dated **7<sup>th</sup> May 2019**. The Court directed that the Preliminary Objection would be heard together with the application of **8<sup>th</sup> April 2019**. The matter proceeded by way of written submissions. The Plaintiff/Applicant filed its written submissions on **1<sup>st</sup> July 2019**, whilst Defendant/Respondent filed his submissions on **9<sup>th</sup> July 2019**. Counsel for both parties appeared before the Court on **10<sup>th</sup> July 2019** in order to highlight their submissions.

**BACKGROUND**

4. The Plaintiff, a limited liability Company registered under the laws of Kenya enlisted the services of the Respondent as Director under a contract of employment. The Respondent was contracted as the Applicant’s Joint Chief Executive Officer for East Africa. The Respondent was expected at all times to perform the duties and exercise the powers which the Plaintiff’s Board would from time to time assign him. The Respondent was further expected to keep his designated superior fully informed of his conduct in the business of the Plaintiff and to keep such records and provide such explanations as his immediate superior would require.

5. The duties assigned to the Respondent as Chief Executive Officer was to ascertain the Plaintiffs tax liabilities and to pay them. The Plaintiff alleges that without its authority and/or approval, the Respondent entered into tax consultancy contractual agreements with third parties being **Bachmann Enterprises Ltd** and **Keycorp Real Advisory Ltd**, whom the Defendant purported to appoint as “**tax agents**” for the Plaintiff.

6. It is alleged that these “tax agents” advised the Defendant on the Plaintiffs tax liabilities following which the Defendant authorized release of monies in respect of those liabilities. However receipts purported to have been issued by the Kenya Revenue Authority in respect of such tax remittances by the Plaintiff were later found not to be authentic and were found not to have been generated from the portal of the Kenya Revenue Authority.

7. The Plaintiff claims that the Defendant deliberately and fraudulently diverted funds intended for tax remittance. It is further alleged that the Defendant deliberately concealed information relating to the Plaintiffs pending tax liabilities resulting in a substantial demand for outstanding taxes from the Kenya Revenue Authority. The Plaintiff then commissioned a forensic audit of its accounts which revealed what they term as fraudulent diversion of tax monies by the Defendant.

8. On account of all the above the Plaintiff summarily dismissed the Respondent from its service and filed a civil suit seeking recovery of the diverted and misappropriated funds. The Plaintiff states that given that the Defendants name still features in the Plaintiff’s records they are apprehensive that the Defendant may attempt to divert further funds and that the Plaintiff will suffer further irreparable damage, if the Defendant is not barred from engaging in further dealing as a Director of the Company. Hence the present application.

9. As stated earlier the application was opposed by the Defendant who denies that he is director of the Plaintiff Company by virtue of any employment contract. The Defendant further denies having entered into any unauthorized tax consultancy agreement on behalf of the Plaintiff with any third party and denies any diversion of the Plaintiff’s funds that were meant to pay taxes.

10. Instead the Defendant avers that he was illegally removed as a signatory to the Plaintiff’s Bank accounts through forged resolutions and bribing of bank officials. The Defendant contends that this application is the culmination of a protracted scheme to isolate him and to enable unilateral decisions to be made to his detriment as a shareholder and Director of the Plaintiff Company. The Defendant asserts that he is a Director of the Plaintiff not by virtue of employment but as a paid up shareholder and therefore his removal from Directorship can only be achieved by means of a Board Resolution during an Annual General meeting. He terms as preposterous the allegation that he is or intends to pass himself off as a director of the Company. Finally the Defendant submits that no prima facie case has been established to warrant the grant of the orders sought in this application.

#### **ANALYSIS AND DETERMINATION**

11. I have carefully considered the submissions filed in this matter. Two issues emerge for determination as follows:-

(i) Whether the Notice of Preliminary Objection dated 7<sup>th</sup> May 2019 ought to be allowed.

(ii) Whether the injunctive orders sought in the Notice of Motion dated 8<sup>th</sup> April 2019 ought to be allowed.

#### **Preliminary Objection dated 7<sup>th</sup> May 2019**

12. The Defendant/Respondent filed a Notice of Preliminary Objection urging the court to strike out the Plaintiff/Applicant’s suit on the basis that the same as filed is fatally defective, vexatious, frivolous and an abuse of court process. The Preliminary Objection was based on the following grounds:-

**“(1) THAT there is no authority and/or resolution under the seal of the Applicant allowing the affiant therein to swear the Supporting and Verifying affidavit as required by Order 4 Rule 1 (4) of the Civil Procedure Rules 2010.**

**(2) THAT the Plaintiff has not authorized through a resolution under its seal the institution of the suit herein in accordance with the law and articles of association, and that the persons who have purported to swear the affidavits, draw and file the pleadings have no authority or instructions to do so.**

**(3) THAT the Plaintiff/Applicant suit as filed herein is fatally defective, vexatious, frivolous and an abuse of the court process and ought to be forthwith struck off with costs to the Defendant.”**

13. The definition of what constitutes a Preliminary Objection was given in the case of **MUKISA BISCUIT MANUFACTURING COMPANY LTD –VS- WEST END DISTRIBUTORS LTD [1969]E.A** where it was stated as follows:-

**“A preliminary objection *consists of a point of law* which has been pleaded, or which arises by clear implication out of pleadings, and *which if argued as a preliminary point may dispose of the suit*. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” [emphasis mine]**

**Newbold P**, in the same case observed as follows:-

**“A preliminary Objection is in the nature of what used to be a demurrer. It raises a *pure point of law* which is argued on the assumption that all the facts pleaded by the other side are correct. *It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion*. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”[own emphasis]**

14. In the case of **ORARO –VS- MBAJA [2005]** eKLR Hon Justice J.B Ojwang (as he then was) stated:-

**“I think the principle is abundantly clear. A “Preliminary Objection” correctly understood is now well defined, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle a true preliminary objection which the court should allow to proceed. I am in agreement..that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”[own emphasis]**

15. Applying the above tests this court must determine whether the Preliminary Objection herein raises points of law which turn on the competence of the application and which if successful may dispose of the entire application.

16. The Defendant/Respondent’s Preliminary Objection was predicated upon **Order 4 Rule 1(4)** of the **Civil Procedure Rules** which provides:-

**“(4) Where the Plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”**

17. The Defendant/Respondent submits that no resolution was exhibited to show that the Plaintiff Company authorized the appointment of the firm of **Mohamed Mungai LLP** to file this application or suit on its behalf. It is further submitted that no authority has been exhibited to authorize **“Shane Leahy”** to swear the Supporting Affidavit on behalf of the company. I note that the Plaintiff/Applicant did not file any Grounds of Opposition to the Notice of Preliminary Objection dated **7<sup>th</sup> May 2019**.

18. The question of whether the deponent of the Supporting Affidavit was authorized to make that deposition is a question of fact not one of law. In **PRESBYTERIAN FOUNDATION & ANOTHER –VS- EAST AFRICAN PARTNERSHIP LIMITED & Another [2012]** eKLR Hon Justice George Odunga held as follows:-

**“The Civil Procedure Rules do not define what an authorized officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavits be sworn by either the directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word “authorize” which is defined by oxford Dictionary as “sanction”, give authority, “commission.” That being the position, whether or not the 2<sup>nd</sup> Plaintiff was given authority to swear the verifying affidavit is a matter of evidence and cannot certainly be the subject of a preliminary objection unless the said fact is admitted.”[own emphasis]**

19. There exists no law or precedent to support the argument that a Plaintiff Company is obliged to file a resolution of said Company authorizing the appointment of counsel to act on behalf of said Company. In **SARAF LIMITED –VS- AUGUSTO ARDUIN [2016]** eKLR the Court of Appeal stated:-

**“...We know of no law that makes it a requirement for a limited liability company that has been sued to furnish proof or to demonstrate that it’s Board of Directors or its shareholders have authorized it to defend the suit. If this were the law, logistical reasons would render it difficult or near impossible for companies to defend suits having regard to the strict time-lines within which appearance and defence must be filed. A limited liability company is a legal person with capacity to sue and be sued (se Solomon & Solomon [1897]AC 22 (H.L). Because it has no blood and tissue, a limited liability company acts through its Board of Directors. The directors are invested with management and superintendence of its affairs and may lawfully exercise all its powers subject to the Articles of Association and to the law. It has always been the law that directors are the persons who have authority to act for the company but the majority of the members of the company are entitled to decide, even to overrule, the directors. In **Shaw and Sons (Salford) V. Shaw [1935]2KB 113, Greer LJ reiterated that:-****

**“if powers of management are vested in the directors, they and they alone can exercise these powers.**

**He also observed what Solomon V. Solomon had much earlier held, namely, that:-**

**“A company is an entity distinct from its shareholders and directors.”**

20. In the supporting Affidavit dated **8<sup>th</sup> April 2019** and the supplementary Affidavit dated **26<sup>th</sup> June 2019**, **Shane Leahy** stated that he was a Director of the Plaintiff Company and had been duly authorized to swear the Affidavit on behalf of the Company. This in my view is sufficient. In any event to establish whether or not **“Shane Leahy”** was so authorized would involve an inquiry as to facts which falls outside the ambit of a Preliminary Objection. Further such enquiry would run afoul of the **“Turquand Rule”** expounded in the case of **ROYAL BRITISH BANK –VS- TURQUAND 66 & b327** which held that people transacting with a Company are entitled to assume that all internal company rules have been complied with.

21. For the above reasons I find that this Preliminary Objection does not meet the standard set out in the **Mukisa Biscuit case**. Accordingly the Notice of Preliminary Objection dated **7<sup>th</sup> May 2019** is dismissed in its entirety with costs to the Plaintiff/Applicant.

**Notice of Motion dated 8<sup>th</sup> April 2019**

22. By this application the Plaintiff/Applicant sought to have the Defendant/Respondent barred from representing himself as a Director of the

Plaintiff Company pending the hearing and determination of the main suit. The Application is premised upon **Order 40 Rule (2)** of the **Civil Procedure Rules 2010** which provides:-

**“2(1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of like kind arising out of the same contract or relating to the same property or right.”**

23. The conditions upon which a temporary injunction may be granted have been established in the celebrated case of **GIELLA –VS- CASMAN BROWN [1973] E.A 358** as follows:-

**“An Applicant has to demonstrate firstly, that he has a prima facie case with a probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of inconvenience.”**

24. The Canadian case of **RJR MACDONALD –VS- CANADA (ATTORNEY GENERAL)[1994] ISCR** aptly captured this three part test as follows:-

(i) Is there a serious issue to be tried (prima facie case)

(ii) Will the applicant suffer irreparable harm if the injunction is not granted?

(iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits of the suit (balance of convenience)

25. The definition of a “**prima facie**” case was given in the case of **MRAO –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] eKLR** as follows:-

**“...In civil cases it is a case in which on the material presented to the court, a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

26. The key question then is whether the Plaintiff/Applicant has established a prima facie case. At this interlocutory stage the Court ought not to delve into the merits of the suit and should refrain from prejudging the case, as these are matters which will be canvassed at the main trial of the suit. **Hon Justice Ringera** (as he then was) in **MARTHA KHAYANGA SIMIYU –VS- HOUSING FINANCE COMPANY OF KENYA LSTD & 2 others HCCC NO.937 OF 2001** (Unreported) observed as follows:-

**“In answering that question [whether a prima facie case has been established] the court is to remember that it is not required – indeed it is forbidden – to make definitive findings of fact or law at the interlocutory stage, particularly where the affidavits are contradictory and the legal propositions are hotly contested as is the case here...”**[own emphasis]

27. In this case the Applicant has claimed that there is a real risk of dissipation of the Applicant’s property by the Respondent. It is alleged that one of the duties of the Defendant/Respondent as **CEO** was to remit taxes to Kenya Revenue authority on behalf of the Plaintiff Company. It is further alleged that the Respondent approved payments to third parties for remittance of these taxes which monies were never remitted to the lawful authority. The Plaintiff claims that the Respondent’s actions in conspiring with third parties to defraud the company or at the very least the negligence of the Respondent in this matter has caused financial harm to the company as it resulted in a tax demand of **Kshs.835,226,122.45**.

28. These are indeed grave allegations. Although the Defendant/Respondent vehemently denies the accusations made against him, these certainly exists in my view a prima facie case. If the Respondent were to continue acting as a Director of the Plaintiff Company then any final success by the Applicant upon a full hearing may be rendered phyrrie especially if the company is subjected to further losses in the meantime.

29. The Applicant has claimed that it is apprehensive that it may suffer irreparable harm if the orders sought are not granted. The term irreparable harm is defined in Paragraph 739 **HALSBURYS LAWS OF ENGLAND 3<sup>RD</sup> EDITION VOL 21** as follows:-

**“By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.”**

30. The Applicant alleges that the Respondent acting as Director has taken possession of the Company assets to wit a motor vehicle log-book taken from the Bank by presenting himself as a Director of Company, that the Respondent has put a caveat at the Companies Registry and has withheld login credentials to the online portal. It is claimed that although the Respondent has been summarily dismissed as a Director of the Plaintiff Company, his name still appears in the Company records. The Respondent counters that as a shareholder he can only be

removed as Director by a Board resolution. The Respondent further alleges that his name has fraudulently been removed as a signatory to all the company accounts following a fraudulent change of mandate. In short accusations and counter-accusations are flying around. All these are matters which require a full hearing at which evidence will have to be adduced to enable the Court determine the issues raised. I reiterate that at this stage the court is not pronouncing itself with regard to the truth or otherwise of the above allegations (which in any event have been strenuously denied by the Respondent). However I do find that such do certainly expose the Plaintiff Company not only to financial loss but also to irreparable harm in respect of reputation and goodwill. Such harm cannot be adequately compensated by an award of damages. I am therefore satisfied that this limb has been proved.

31. In deciding whether or not to grant an interlocutory injunction, it is now trite law that the court should opt for the lower risk of injustice. In **SULEIMAN –VS- AMBOSELI RESORT LTD [2004] 2KLR 589 Hon Justice J.B Ojwang** (as he then was) states as follows:

**“Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in *Giella Vs Cassman Brown*, the Court has to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied: (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.”**[own emphasis]

32. Likewise in **FILMS ROVER INTERNATIONAL –VS- CANNON FILMS SALES LTD [1986] E ALL ER**, the Court stated:-

**“A fundamental principle is...that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”...”**

33. In this case I find that the balance of convenience favours the Plaintiff/Applicant. Accordingly I do grant the interim injunction as prayed in terms of prayer (4) of the present application. Costs to be met by the Defendant/Respondent.

### **CONCLUSION**

For avoidance of doubt the court makes the following orders:-

- (1) The Preliminary Objection dated **7<sup>th</sup> May 2019** is disallowed.
- (2) Costs of the Preliminary Objection dated **7<sup>th</sup> May 2019** to be met by the Defendant/Respondent.
- (3) The Respondent be and is hereby barred from use or transfer of the Applicant’s resources and assets pending the hearing and determination of the main suit.
- (4) Costs of the Notice of Motion dated **8<sup>th</sup> April 2019** to be met by the Defendant/ Respondent.
- (5) Prayer 5 of the Application is declined.
- (6) Orders as above.

**Dated in Nairobi this 7<sup>th</sup> day of February 2020.**

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**Justice Maureen A. Odero**